Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

IN THE MATTER OF THE ESTATE OF
ROBERT L. JOHNSON, DECEASED,
ROBERT M. HARRIS and ANNYE C. ANDERSON,

Petitioners,

vs.

CLAUD L. JOHNSON,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

PETITION FOR WRIT OF CERTIORARI

WHITMAN MOUNGER
Of Counsel
Whittington Building,
Suite 2
Post Office Box 1123
Greenwood, Mississippi
38930-1123
(601) 453-7604

LEO NEVAS
Counsel of Record
STEPHEN E. NEVAS
Of Counsel
NEVAS, NEVAS & CAPASSE
246 Post Road East
Post Office Box 791
Westport, Connecticut
06881-0791
(203) 226-1211
Counsel for the Petitioners

November, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

The Petitioners are legatees of a person who they have shown was the last surviving sibling of the Decedent Robert L. Johnson. The Respondent, who was born out of wedlock, claimed for the first time at age 61, 54 years after the Decedent's death, that he is the son and sole heir of the Decedent. The questions presented are:

1. Whether Petitioners were denied their right to procedural due process under the Fourteenth Amendment when an appellate court, which reviewed an order for summary judgment to strike the Respondent's claim for failing to file within a remedial period of limitations enacted in response to *Trimble v. Gordon*, 430 U.S. 259, *sua sponte*, invoked the doctrine of *executor de son tort* against the Petitioners and used it as its basis to equitably "waive" the statute of limitations without an opportunity for the Petitioners to gather evidence, offer defenses or argue the issues?

2. Whether the decision of an appellate court to *sua sponte* invoke the doctrine of *executor de son tort* to equitably "waive" a period of limitations that govern the time in which a person born out of wedlock may claim from the intestate estate of a man alleged to be his biological father is in conflict with this Court's decisions in *Trimble v. Gordon*, supra, *Lalli v. Lalli*, 439 U.S. 259 and *Mills v. Habluetzel*, 456 U.S. 91, that states have an interest in discouraging the litigation of stale and fraudulent claims which justifies imposing reasonable periods of limitation?

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PETITION FOR WRIT OF CERTIORARI

Robert M. Harris and Annye C. Anderson respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case.

OPINIONS BELOW

The opinions of the Supreme Court of Mississippi (App., *infra*, 1) are unreported. The order of the Chancery Court of Leflore County, Mississippi (App., *infra*, 18) is unreported.

JURISDICTION

The Supreme Court of Mississippi entered its judgment on March 28, 1996. Petitioners filed their Petition for Rehearing on April 12, 1996. The Supreme Court of Mississippi denied the Petition with four members of the Court dissenting and entered its judgment on August 21, 1997. The jurisdiction of this Court invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED*

The Petitioners rely on the Fourteenth Amendment to the Constitution of the United States and the additional provisions of law below.

Mississippi Code of 1972 (amended)

Descent among illegitimates; definitions.
Sec. 91-1-15(3)(d)(ii).
(Paragraph 2)

A remedy is hereby created in favor of all illegitimates having any claim existing prior to July 1, 1981, concerning the estate of an intestate whose death occurred prior to such date by or on behalf of an illegitimate or an alleged illegitimate child to inherit from or through its natural father and any claim by a natural father to inherit from or through an illegitimate child shall be brought within three (3) years from and after July 1, 1981, and such time period shall run not withstanding the minority of the child.

Mississippi Code of 1972 (amended), The Preamble to Chapter 339, (Sec., 91-1-15), Laws, 1983. (Paragraph 5)

WHEREAS, the Legislature recognized at the time it was considering said amendment that by creating said remedy the Legislature was opening the door to the possible litigation of stale and fraudulent claims and that a further effect of bestowing said remedy upon all illegitimates would possibly be to create a certain amount of confusion and uncertainty as to the status of titles to real

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* The full text of statutes or rules reproduced in part herein have been lodged with the Clerk.

property; however, the Legislature intended to bestow upon illegitimates a new and additional remedy whereby such illegitimates could maintain their rights of inheritance notwithstanding such interests of the state in preventing stale and fraudulent claims and avoiding uncertainty as to the titles to real property and, accordingly, the Legislature enacted appropriate periods of limitations within which illegitimates could bring their claims;

NOW THEREFORE, in order to eliminate any ambiguity in Section 91-1-15, Mississippi Code of 1972, and to conform said section to express the true legislative intent, BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI.

Mississippi Code of 1972 (amended)

Sec. 91-1-251. **Liability of executor or administrator of an *executor de son tort*.**

The executor or administrator of an *executor de son tort* shall be liable to a recovery to the extent of the value of the property received or held by such *executor de son tort*, if sufficient assets shall have been received to pay the same. Any one who may have become liable as *executor de son tort* in any other state shall be liable to be sued in this state as such by any creditor, legatee or distributee.

Mississippi Rules of Civil Procedure

Rule 12. **Motions and Defenses**

. . . (b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be

asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

. . . (6) Failure to state a claim upon which relief may be granted, . . .

. . . If, on a motion to dismiss for failure to state a claim upon which relief may be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56 . . .

Rule 56. **Summary Judgment**

. . . **(c) Motion for Judgment on the Pleadings.** . . . The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . .

. . . **(e) Form of Affidavits; Further Testimony; Defense Required.** . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific

facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

STATEMENT

A. Factual Background

The Decedent Robert L. Johnson, whose estate in probate forms the basis for this matter, was a musician and an originator of a kind of American music known as the Mississippi Blues. He died on August 16, 1938, in Greenwood, Mississippi, leaving no will. During his lifetime the Decedent made 41 phonograph records. The guitarist Eric Clapton has described Johnson as "the most important blues musician who ever lived." (R. Deposition of Eula Mae Williams, addenda, 23) Carrie Harris Thompson, who the Petitioners have shown is the Decedent's half-sister and last surviving sibling, died while a resident of Maryland in 1983. By her will, admitted to probate in Anne Arundel County, Maryland, she left all rights which she may have had to Robert Johnson's music, likeness and story to the Petitioners who are her grandson Robert M. Harris, a resident of Maryland, and her half-sister Annye C. Anderson of Massachusetts. (R. Transcript of Hearing, May 22, 1991, Ex. 3).

B. Proceedings Before the Chancery Court

Mrs. Anderson was appointed by the Chancery Court of Leflore County, Mississippi on June 1, 1989 as Administratrix of the Decedent's estate. (R. Vol. 1, 9). When the

court became aware that a contest had developed for heirship in which the Administratrix was one of the claimants, the Court substituted its Chancery Clerk as a "disinterested" Temporary Administrator in 1991. (R. Vol. 4, Hearing of May 22, 1991, 93-94). Claims to heirship were lodged by the Petitioners Harris and Anderson, by the Respondent Claud L. Johnson and by additional party not relevant to these proceedings.

On April 30, 1992, the Petitioners moved to strike the Respondent's claim under Rule 12(b)(6) of the Mississippi Rules of Civil Procedure for failure to state a claim on which relief may be granted. MRCP Rule 12(b) converted the Petitioners' Motion to one for summary judgment under MRCP Rule 56. (R. Vol. 2, 269) Petitioners based their Motion on a period of limitations in Mississippi Code Section 91-1-15 that had expired. When the Legislature brought this provision into conformity with this Court's decision in *Trimble v. Gordon*, 430 U.S. 762, 52 L. Ed. 2d 31, 97 S. Ct. 1459 (1977), it amended Section 91-1-15(3)(d)(ii) to create a new "remedy . . . in favor of all illegitimates having any claim existing prior to July 1, 1981, concerning the estate of an intestate whose death occurred prior to that date . . . " and it provided that such a claim "shall be brought within three years" or no later than June 30, 1984. (*Infra*). In March, 1983 the Mississippi Legislature took the highly unusual step of adopting a Preamble to Sec. 91-1-15 to explain its awareness that it was "opening the door to the possible litigation of stale and fraudulent claims" but that it intended to limit this risk by imposing a three-year period of limitation on them. (*Infra*).

The Respondent, a resident of Mississippi, did not avail himself of this remedy. He took no action until 1992 although the Decedent had been dead since 1938.

In support of their Motion for Summary Judgment the Petitioner and original Administratrix Anderson filed an Affidavit in which she affirmed "that at no time in (her) life, up to and including the conclusion of (her) term as Administratrix . . . did (she) ever meet or was (she) ever told by any person or did (she) ever hear of, read about or know of . . . the existence of (the Respondent) or of anyone meeting his description . . . " (R. Vol. 3, 357). The Respondent pleaded in opposition that the statutory period of limitations should not apply because "the original Administratrix knew or should have known of (his) existence and whereabouts, and his relationship to the Decedent . . . and aver(ed) that he was entitled to actual notice of this estate proceeding . . . " He did not offer facts or evidence to support these claims. He also alleged that "the original administratrix's failure to exercise reasonable diligence to locate and give him notice" of the opening of the estate in 1989 "deprived him of due process" under the Fourteenth Amendment to the Constitution. (R. Vol. 3, 325).

The Chancery Court found that the period of limitations did apply to the Respondent. It barred his claim (R. Vol. 3, Hearing, June 22, 1992, 40) and granted Petitioners' Motion for Summary Judgment, striking the Respondent's claim. (App., *infra*, 18).

C. Proceedings before the Mississippi Supreme Court

On August 19, 1992, the Respondent appealed to the Mississippi Supreme Court from the Chancery Court's Order of Summary Judgment, striking his claim. On March 28, 1996, acting *sua sponte,* the Court applied the doctrine of *executor de son tort* to Petitioners and using the doctrine as its justification, employed "equity" to "waive" the period of limitations in Mississippi Code Section 91-1-15(3)(d)(ii), thereby reversing the Order of Summary Judgment. (App., *infra,* 11).

Petitioners filed a Petition for Rehearing on April 12, 1996. They argued that the Court's invocation of *executor de son tort* denied them "the essentials of notice and an opportunity to be heard which form the basis of Due Process pursuant to the Fourteenth Amendment." They also argued that the doctrine of *executor de son tort,* a creature of both statutory (Mississippi Code Sec. 91-1-257) and case law, "is implied only for the purpose of fixing financial responsibility" and "is subject to defenses" which the Petitioners were entitled to assert. (Petition for Rehearing, April 12, 1996, 5, 7-8) The Petition was denied on August 21, 1997 with four members of the Court dissenting.

Justice Banks wrote for himself and three other members of the Court in dissent.

> " . . . (T)he Court has decided to apply a new doctrine on an appeal from a grant of summary judgment to dispose of a material issue of law adversely to the appellees. Thus, the appellees are wholly deprived of an opportunity to confront this claim with proof. The Court should

not be the instrument of such a blatant denial of due process."

"As the petitioners point out in the request for rehearing, the doctrine of *executorship de son tort* that has been utilized by the Court to reach its conclusions is subject to defenses that the petitioners could have asserted had Claud Johnson invoked this doctrine in support of his claim of heirship in the Chancery Court below. Indeed, that doctrine was never raised by any party: not in the chancery court below, not in briefs on appeal, not even at oral argument. This court has reversed the chancery court's grant of summary judgment on a clear statute of limitations issue, then, on a fact-intensive legal theory of fraud, and has rendered judgment in favor of the party opposing summary judgment. Petitioners have had no opportunity to make any record on their liability as *executrices de son tort*, nor an opportunity to assess the causal connection between any such liability and the statute of limitations here at issue in Claud's claim. They are entitled to a remand to develop a record on this question." (App. *infra*, 12-13).

REASONS FOR GRANTING THE WRIT

This matter presents an unexpected result of this Court's decisions that have established the right of out of wedlock children under the equal protection clause of the Fourteenth Amendment to claim support or inheritance from the estate of a man who died intestate and who they allege to be their biological father. *See, e.g, Trimble v. Gordon*, 430 U.S. 762, 52 L. Ed. 2d 31, 97 S. Ct. 1459; *Mills*

v. Habluetzel, 459 U.S. 91, 71 L. Ed. 2d 770, 102 S. Ct. 1549 (1982). At the heart of *Mills* is the requirement that the states provide a "reasonable opportunity" for out of wedlock children and their guardians to make such claims, balanced by the right of the states to limit the risk of stale and fraudulent claims by enacting reasonable periods of limitation. *Id.*, 99.

That balance is called into question by the decision in this case. The Mississippi Supreme Court, without the benefit of notice, an adequate record, hearing, argument or nexus between acts alleged and proof which is nonexistent, will allow a man who was 61 years old when he made his claim to assert it against the estate of his alleged father who has been dead for more than 54 years although the remedial period of limitations enacted in that state to bring its laws into compliance with this Court's decision in *Trimble v. Gordon* had long since ended.

At no time while hearing or deciding the appeal below or petition for rehearing did the Mississippi Supreme Court acknowledge this Court's or its own Legislature's well-articulated concern for the need to avoid "the litigation of stale and fraudulent claims". *See, e.g., Mills*, 459 U.S. 91, 99, 71 L. Ed. 2d 770, 102 S. Ct. 1549; Code of Mississippi, Sec. 91-1-15, Preamble to Chapter 339. (*Infra*).

Both the decision and the circumstances in which it was reached deprived the Petitioners of their right to procedural due process under the Fourteenth Amendment. First, the reviewing court invoked *executor de son tort*, a statutory and common law doctrine of civil liability

and employed it to *presume* malign intent on the part of the Petitioner Annye Anderson.[1] *Executor de son tort* is akin to constructive trusteeship. It is not a doctrine which contemplates fault or concerns itself with intent. No notice or opportunity was afforded Mrs. Anderson to offer evidence or defenses to the doctrine although she is entitled to assert them. Then, using *executor de son tort* as its justification, the Court concluded that "equity will waive" the period of limitations which had barred the Respondent's claim. This apparent application of 'equitable tolling' by the reviewing court should, according to the decisions of this Court and numerous federal circuits, have entitled the Petitioners to notice and the opportunity to make an evidentiary record that would have been measured at trial and on appeal by strict standards to assure, among other things, the presence of an evidentiary nexus and that the person seeking to toll the period of limitations had not failed to exercise due diligence. None of these criteria were considered or defenses accorded to the Petitioners.

It is also significant that this matter came to the Mississippi Supreme Court on appeal from an Order for Summary Judgment by the Chancery Court, which, in accordance with the statute of limitations, had struck the Respondent's claim. At trial the Respondent did not meet the requirement of MRCP 56(e) to provide affidavits or other forms of evidence in support as the Rule provides

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[1] "An *executor de son tort* is . . . a person who assumes to act as executor of an estate without any lawful warrant or authority, but who, by his intermeddling, makes himself liable as an executor to a certain extent." *Black's Law Dictionary*, 5th Ed., 1979.

but instead rested upon the allegations of his pleadings which the rule warns makes summary judgment against him appropriate.

On appeal the Mississippi Supreme Court did not confine itself to a determination of whether there was a "genuine issue for trial" as Mississippi Rules of Civil Procedure 56(e) requires but looked beyond and decided a question on grounds not raised by any party in their moving papers, briefs or oral argument at trial or on appeal.

The Petitioners' right to procedural due process was further denied when the reviewing court relied on a hearing transcript not considered at summary judgment because it had been created by the Chancery Court for administrative purposes at an earlier time with the involvement of a party other than the Respondent and without the benefit of essential evidentiary rules. The transcript is punctuated by repeated warnings from the trial judge that the documents it contains are not to be used for any other purpose without further proceedings.

I

Invocation *Sua Sponte* of the Doctrine of *Executor De Son Tort* to Justify Equitable 'Waiver' of a Remedial Period of Limitations Affecting the Inheritance Claim of an Out of Wedlock Adult And Without An Adequate Evidentiary Record or Opportunity to Gather and Present Evidence and Defenses Denied the Petitioners Their Right to Procedural Due Process Under the Fourteenth Amendment.

When Carrie Harris Thompson, the grandmother of Robert M. Harris and the half sister of Annye C.

Anderson died in 1983, she left a will that was duly admitted to probate in Anne Arundel County, Maryland. (R. Hearing of May 22, 1991, Ex. 3) By its terms she devised to the Petitioners any right, title and interest in the music, likeness and biography of the Decedent which she may have possessed. They therefore "have a legitimate claim of entitlement" to the Decedent's estate. *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972).

The *per se* designation of the Petitioner Annye Anderson by the Mississippi Supreme Court as an *executrice de son tort* took place without any procedural protection. The Court marked her with this label because Mrs. Anderson accepted a power of attorney from her half-sister Carrie Thompson who had been trying to find the assets of the unprobated estate of the decedent at a time when the latter woman's health began to fail. (App., *infra*, 9). Then, without affording Mrs. Anderson any opportunity to assert any of the defenses to which she was legally entitled, the Mississippi appellate court employed the designation as justification to presume malign intent on her part and declare that "equity will waive" the period of limitations within which the Chancery Court found the Respondent had failed to file. (App., *infra*, 11). Petitioners are left to conclude that the Mississippi Supreme Court believed it was applying the principle of 'equitable tolling.'

***Executor de Son Tort* Is Improperly Applied**

This appears to be a case of first impression with respect to the use of *executor de son tort* as a basis for tolling a period of limitations. Petitioners have not been able to identify another reported instance in which a court has relied on the doctrine for this purpose, certainly not in connection with an inheritance claim by one born out of wedlock from an alleged intestate father.

Until the time of this decision it had been clear that, "The office of *executor de son tort* is implied *only* for the purpose of suing an intermeddler or making him financially liable in damages for the assets with which he has intermeddled." 31 Am. Jur. 2d, Sec. 34. (emphasis added) It is a fact-intensive claim. Had the Petitioners received notice of its possible application, they would therefore have been entitled to present defenses. For example, the performance of certain acts, such as to conserve the estate, "have been determined not to make one liable as *executor de son tort*." 31 Am. Jur. 2d, Sec. 38; 34 C.J.S. 2d Sec. 1064 e, 1363. But, since no heirs have been determined there is no one to assert it.

Once it designated Mrs. Anderson as *executor de son tort*, the Mississippi Supreme Court used it as a basis to find malign intent on her part and posthumously on the past of her legator Carrie Harris Thompson as justification to employ "equity" to "waive" or to equitably toll the period of limitations and revive the Respondent's right to claim. But as Justice Banks emphasized, *executor de son tort* is not a doctrine of fault or moral turpitude.

> "The principles that guide such executors' liability do not, to say the least, bespeak any punitive recriminations that typically characterize the types of fraud that are often used to equitably excuse the operation of independent statutes of limitation. Indeed, I have seen no authority in any jurisdiction for the proposition that *executorship de son tort* necessarily implies such malign intent on the part of the tortious executor as will toll a statute of limitations that might independently operate to bar another claimant against an estate." (App., *infra,* 15)

Equitable Waiver Or Tolling Is Prematurely Invoked

"Equitable tolling," like *executor de son tort,* is fact-based and is not a *per se* doctrine. *See, e.g., Bowen v. City of New York,* 476 U.S. 467, 480-481, 90 L. Ed. 2d 462, 106 S. Ct. 2022 (1986); *Honda v. Clark,* 386 U.S. 484, 18 L. Ed. 2d 244, 87 S. Ct. 1188 (1967). "Parties who rely on equitable tolling through fraudulent concealment have the burden of demonstrating applicability." *Hill v. U.S. Dept. of Labor,* 65 F.3d 1331 (6th Cir. 1995). Here, the Respondent offered no evidence in any form, even at summary judgment when MRCP 56 required it in order to avoid an adverse ruling.

The standards for the application of equitable tolling are rigorous:

> "To establish that equitable tolling applies, a plaintiff must prove the following elements: fraudulent conduct by the defendant resulting in concealment of the operative facts, failure of the plaintiff to discover the operative facts that are the basis of its cause of action within the

> limitations period, and due diligence by the plaintiff until discovery of those facts. *See, e.g., King & King Enterprises v. Champion Petroleum Company*, 657 F.2d 1147, 1154 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164, 102 S. Ct. 1038, 71 L. Ed. 2d 320 (1982); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975). *Federal Election Com'n v. Williams*, 104 F.3d 237, 240-241 (9th Cir. 1996).

Implicit in these decisions is a requirement of notice and opportunity for parties for and against tolling to present evidence, argument and create an adequate record in which both have an opportunity to demonstrate a nexus or lack of one between events complained of and tolling as a remedy. "Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972). A party against whom equitable tolling may be applied is entitled to present defenses. *See, e.g., Freeman v. FDIC*, 56 F.3d 1394, (D.C. Cir. 1995). There has never been the opportunity for any hearing about this matter or anything vaguely resembling it.

The "Due Process Clause . . . at a minimum . . . require(s) that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L. Ed. 873 (1949). Before and during the reviewing court's two-step analysis from the imposition of *executor de son tort* to the application of equitable tolling, there was no notice and no evidentiary hearing.

The Mississippi Supreme Court grounded significant portions of its decision on materials that had been collected by the Chancery Court on May 22, 1991 without essential evidentiary protections and which the Chancellor had accordingly placed off limits for other than narrow administrative purposes. This happened more than a year before the summary judgment proceeding when the Chancery Court held a hearing so that the Chancellor could, in his own words, "(get) a feel for this case." (R. Vol. 4, Hearing of May 22, 1991, 9). Since it appeared that there was some potential for an heirship contest between the Petitioner Annye Anderson, then also Administratrix, and another claimant not relevant to these proceedings, the Chancellor wanted to see if he should substitute a "disinterested" Administrator for Mrs. Anderson. (*Ibid.*, 91).

The Petitioner and the other party were represented by counsel who offered exhibits. While the Court was prepared to admit the exhibits informally it was not willing to apply customary rules of evidence to their submission, particularly cross examination and confrontation that determines their admissibility and the purposes for which they may be admitted. When documents were offered the Chancellor announced:

> "They will be admitted as far as this hearing is concerned. Not admitted for any other purpose, at this stage, as far as this hearing is concerned." (*Ibid.*, 8).

When other counsel asked for elaboration, the Court replied:

> " . . . I am allowing them to be introduced only insofar as they might prove some assistance to

> the Court in sort of getting a feel for this case. I am not having them introduced as to the truthfulness of them, or to the validity of these documents insofar as they go to establish heirship. Far from it." (*Ibid.*, 9)

Again, at the close of the Hearing, the Court repeated its admonition about the exhibits that had been offered.

> " . . . I've limited the introduction of these documents for this hearing alone, in order to give me a general idea of what has happened so that I can understand a little better what has gone on before." *(Ibid.*, 97)

The exhibits were not revisited before or at summary judgment.

"Procedural due process often requires confrontation and cross-examination . . . " *Willner v. Committee on Character & Fitness,* 373 U.S. 96, 10 L. Ed. 2d 224, 83 S. Ct. 1175 (1963). Neither were permitted with respect to the documents on which the reviewing court relied. The two-step procedure from determination that the Petitioner Annye Anderson was culpable as *executor de son tort* to its use as the basis on which to declare an equitable tolling of the statute of limitations that revived Respondent's claim to the Decedent's estate deprived Petitioners of the essential elements of procedural due process under the Fourteenth Amendment to their considerable prejudice.

Throughout these proceedings the Respondent has failed to demonstrate a nexus of any kind between the efforts of the Petitioners and his failure to timely assert his claim of paternity and heirship. Nor did the reviewing court find one.

Justice Banks wrote, dissenting:

> "(T)he Court was unable to conclude with certainty that the petitioners' "intermeddling" that gave rise to their status as *administratrices de son tort* occurred during the relevant time period, the three-year window given claimants such as Claud by statute . . . " (App., *Infra,* 14)

The Respondent has sat silent in both the trial and appellate courts and has offered pleadings but no supporting evidence to justify the imposition of either doctrine adopted by the Mississippi Supreme Court. Unless the decision below is reversed the Petitioners will, to their considerable prejudice, be compelled to defend the claim of an adult born out of wedlock to the intestate estate of the man he alleges is his biological father more than 54 years after the Decedent died and more than 61 years after the alleged son of the Decedent was born.

II

Equitable 'Waiver' or Tolling of A Period of Limitation Affecting the Intestate Estate Claim of an Out Of Wedlock Adult That Permits His Claim Against The Estate of His Alleged Father More Than Sixty-One Years After His Birth Without A Demonstrated Nexus Between His Failure to Timely File and The Conduct of Petitioners Conflicts With the Underlying Rationale of This Court's Decisions in *Trimble v. Gordon, Lalli v. Lalli* and *Mills v. Habluetzel* That States Have An Important Interest In Discouraging the Litigation of Stale and Fraudulent Claims Which Justifies Reasonable Periods of Limitation.

On appeal from the summary judgment order that found the Respondent subject to periods of limitations (Brief of Appellees, 19-20, 24) and at oral argument before the Mississippi Supreme Court Petitioners discussed the need that this court and the Mississippi Legislature have expressed to avoid "the litigation of stale and fraudulent claims". *See, e.g., Mills, supra* at 99, *Preamble to Chapter 339*, Code of Mississippi Sec. 91-1-15, *infra*. Not in its decision or in response to Petitioners' Motion for Rehearing did the Court respond or even notice this concern.

Particularly since 1977 when this Court decided *Trimble, supra*, and in decisions since that time, the Court has developed a body of law that establishes the right of an out of wedlock child to claim support and inheritance from its alleged biological father that is coupled with the need for some restrictions. *See, e.g., Lalli v. Lalli*, 439 U.S. 259, 58 L. Ed. 2d 503, 99 S. Ct. 518 (1978); *Mills v. Habluetzel*, 456 U.S. 91, 71 L. Ed. 2d 770, 102 S. Ct. 1549.

At the outset, this Court explained that "statutory discrimination against illegitimate children is unconstitutional," a violation of the equal protection clause of the Fourteenth Amendment. *Trimble, supra* at 766. It added:

> "Our previous decisions demonstrate a sensitivity to 'the lurking problems with respect to proof of paternity . . . (citations omitted) . . . and the need for the States to draw arbitrary lines . . . to facilitate potentially difficult problems of proof.' " *Id.* at 771.

In *Lalli,* without abandoning its support of the equal protection clause to protect out of wedlock children from statutory discrimination, this Court recognized that the states may adopt "discrete procedural demands." By way of justification, the decision observes that "Establishing maternity is seldom difficult . . . (because) . . . In most cases the child remains with the mother and for a time is necessarily reared by her." *Lalli, supra* at 268. On the other hand:

> "Fraudulent assertions of paternity will be much less likely to succeed, or even to arise, where the proof is put before a court of law at a time when the putative father is able to respond rather than first brought to light when the distribution of the assets of an estate is in the offing." *Lalli, supra,* 271-272.

In *Mills,* this Court was asked to answer a question that parallels that posed by this matter, "to determine the extent to which the right of illegitimate children . . . may be circumscribed by a State's interest in avoiding the prosecution of stale and fraudulent claims." *Mills, supra,* 92. The Court's answer was again in two parts.

First, the allowable period of time in which to claim must "present a reasonable opportunity." *Id.*, at 99.

Second, "The State's interest in avoiding the litigation of stale and fraudulent claims will justify those periods of limitation that are sufficiently long to present a real threat of loss of diminution of evidence, or an increased vulnerability to fraudulent claims." *Id.*

This prescription, a *reasonable opportunity* to claim support and inheritance, balanced by a recognition of the necessity for periods of limitation to control the risks of *stale and fraudulent* represents a carefully calibrated balance between competing interests.

The role of statutes of limitation is beyond debate.

> "They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared and evidence has been lost." *Chase Securities v. Donaldson*, 325 U.S. 310, 314, 89 L. Ed. 1635, 65 S. Ct. 1561 (1945).

This was reaffirmed in *Bowen v. City of New York*, 476 U.S. 467, 481, n. 13 citing *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974). "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

This symmetry and inter-dependence of the individual and state interest in periods of limitation is described in *U.S. v. Marion*, 404 U.S. 307, 322, 30 L. Ed. 2d 468, 92 S.

Ct. 455 (1971). They "are made for the repose of society and protection of those who may [during the limitation] . . . have lost their means of defence."

The Respondent here was afforded a *reasonable opportunity* to assert his claim. No later than April, 1977, when this Court decided *Trimble, supra,* the Respondent possessed an undisputed right to claim that he was an heir of the Decedent. But, he did not do so and he has offered no explanation, only an attack, by way of allegations alone, on the Petitioner Annye Anderson. When the Mississippi Legislature amended Code Section 91-1-15 in 1981 to conform with *Trimble* by creating a remedial three-year period of limitations for out of wedlock children born prior to that date, the Respondent who was 49 years old and living in Mississippi, failed to take advantage of it. He does not contend that the nature of his paternity was not known to him until later in life.

The succeeding fifteen-year delay before Respondent filed his claim compounded the already difficult problems of proof and the risks that concerned the Mississippi Legislature when it amended Section 91-1-15 and enacted an explanatory Preamble. The facts here validate those concerns: When the Respondent was born in 1931, persons then familiar with the circumstances of his paternity would now be in their 70s or older. Even if they are still living and can be located, how likely will it be that they will have a clear and unvarnished memory of what took place more than 61 years before? Does it comport with elemental fairness to expect that those who must defend against such a claim in the late 1990s can gather reliable evidence of what took place in 1931? Nor does the record

disclose any reasonable prospect of blood testing to disprove paternity. It does not indicate any possibility of genetic testing.

The Petitioners' and the State's interests in reasonable periods of limitation has been made more urgent in this case by the passage of time. Those interests ought not to be cast aside by the use of a newly minted *per se* doctrine of *executor de son tort* which is then used as the rationale for resort to 'waiver' of a carefully calculated and justified period of limitations. To have done so in the manner undertaken below strikes at the core of Petitioners' right to procedural due process under the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Leo Nevas
Nevas, Nevas & Capasse
246 Post Road East
Post Office Box 791
Westport, Connecticut 06881-0791
(203) 226-1211
Counsel for the Petitioners

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 92-CA-00883-SCT

IN THE MATTER OF THE ESTATE OF ROBERT L. JOHNSON, DECEASED: CLAUD L. JOHNSON

v.

ROBERT M. HARRIS AND ANNYE C. ANDERSON

DATE OF JUDGMENT:	06/22/92
TRIAL JUDGE:	HON. JON M. BARNWELL
COURT FROM WHICH APPEALED:	LEFLORE COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	JAMES WARREN KITCHENS NANCY A. OLSON
ATTORNEY FOR APPELLEES:	STEPHEN E. NEVAS
NATURE OF THE CASE:	CIVIL-WILLS, TRUSTS AND ESTATES
DISPOSITION:	REVERSED AND REMANDED – 3/28/96
MOTION FOR REHEARING FILED:	4/12/96
MANDATE ISSUED:	

BEFORE DAN LEE, C.J., BANKS AND MILLS, JJ.

MILLS, JUSTICE, FOR THE COURT:

¶1. This appeal questions the entry by the Chancellor below of an order dismissing the claim of Claud L. Johnson as the illegitimate son and only direct heir of Robert L. Johnson, deceased.

¶2. Julia Major and Charles Dodds were married on February 2, 1889. While still married to Charles, but separated from him, Julia gave birth to Robert L. Johnson in Hazlehurst, Mississippi, on May 11, 1911. The father of Robert L. Johnson was one Noah Johnson.

¶3. Julia birthed eleven children by Charles (who later assumed the surname of Spencer) before her death in 1949. One of these children was Carrie H. Thompson, half-sister to Robert L. Johnson.

¶4. After Julia's death, Charles Dodds cum Spencer married Mollie Jackson. This marriage produced Annye Anderson, half-sister to Carrie H. Thompson. Annye is unrelated to Robert.

¶5. Robert L. Johnson became an accomplished musician, singer and songwriter during his short life. He specialized in that art form now known as "the blues." In between performances as an itinerant bluesman, Robert occasionally interrupted his ramblings to enjoy marital bliss. Robert first married Virginia Travis on February 17, 1929, in Penton, Mississippi. Virginia died in childbirth on April 10, 1930. The child was stillborn.

¶6. Robert married Colleta Craft on May 4, 1931, in Hazlehurst, Mississippi. Colleta died without issue in 1933 or 1934.

¶7. The appellant in this case, Claud L. Johnson, was born out of wedlock to Virgie Jane Smith on December 16, 1931, in Lincoln County, Mississippi. His birth certificate names R.L. Johnson as his father. Johnson's occupation is listed as a laborer.

¶8. Robert L. Johnson died "outside" of Greenwood, Mississippi, on August 16, 1938, at the age of 27. He recorded 29 songs during his short life. His recordings have greatly influenced modern popular music.

¶9. Carrie H. Thompson, one of Robert L. Johnson's half-siblings, lived in Maryland. She entered into an agreement with Stephen C. LaVere of Memphis, Tennessee, on November 20, 1974, whereby she assigned all of her purported rights to copyrights of Johnson's works, photographs of Johnson and any other materials concerning Johnson she might have to LaVere. In return, LaVere was to pay her fifty percent of all royalties collected by him as a result of his efforts to capitalize on Johnson's musical and artistic legacy.

¶10. On July 17, 1981, Annye C. Anderson, of Barrington, Illinois, wrote Carrie H. Thompson, her half-sister, and furnished her a power-of-attorney, prepared by one Mr. Kasilovsky [sic], her attorney, granting Ms. Anderson irrevocable power to act for her in all of her affairs. This power of attorney was executed on July 22, 1981. Ms. Anderson stated that she obtained the power of attorney because "Uh, I was dealing with the Robert Johnson Estate with my sister. And my sister was ill. And she wanted me to handle her affairs."

¶11. The record next contains correspondence from Krasilovsky to Ms. Anderson concerning the estate of Robert L. Johnson, dated August 27, 1982. This letter advised Ms. Anderson to select " . . . a formal attorney in Mississippi or place of death for opening the estate for official probate purposes." According to the attorney,

"This step is necessary to establish basic title in your sister as administratrix."

¶12. Carrie H. Thompson died testate in Maryland on February 20, 1983.

¶13. The testatrix appointed Annye C. Anderson as her "personal representative" and devised all of her property, including " . . . all rights and claims I may have as a result of an agreement dated November 20, 1974 . . . " to Ms. Anderson and to the testatrix's grandson, Robert M. Harris. A copy of the agreement with LaVere was attached to Thompson's will. The will is accompanied by codicils which appear to conflict with the original intent of the testatrix. (These inconsistencies are matters for the Maryland probate court to interpret.) Within 30 days of the death of Thompson, Annye C. Anderson filed the will and codicils for probate in Maryland.

¶14. On June 1, 1989, Annye C. Anderson filed her initial petition to open the estate of Robert L. Johnson in the Chancery Court of Leflore County, Mississippi. She was appointed administratrix on June 1, 1989. The notice to creditors was not issued until May 6, 1991.

¶15. In the interim, Columbia Records released *Robert L. Johnson – The Complete Recordings* in 1990. These recordings have enjoyed extensive popularity. The inventories and accountings filed by Anderson in 1990 and 1991 state that the estate contained no property or money and that the only assets were " . . . miscellaneous and unknown."

¶16. Due to objections filed by other parties below, the Chancellor removed Anderson as administratrix and appointed Willis B. Brumfield, Chancery Clerk of Leflore

County, as successor administrator on May 28, 1991. On August 29, 1991, the Estate of Robert L. Johnson entered into a contract with Stephen LaVere authorizing him to act as agent for the estate.

¶17. Claud L. Johnson, through counsel, filed his formal entry of appearance in the estate on February 19, 1992. He timely responded to a petition to determine heirship filed against him by Brumfield on March 10, 1992.

¶18. Finally, on March 23, 1992, the statutorily-required summons to unknown heirs was first published.

¶19. In his answer to the petition for determination of heirship, Claud alleged that he was the illegitimate son of Robert L. Johnson, deceased, and that he is the sole heir of the deceased. He also alleged that " . . . the original administratrix's failure to exercise reasonable diligence to locate him and give him such notice deprived him of due process at law . . . " under the constitutions of the United States of America and the State of Mississippi.

¶20. Claud found a stone in his passway when Ms. Anderson filed a Motion to Strike the Affirmative Allegations and Dismiss the Claim of Defendant Claud Johnson. Ms. Anderson hung her hat on Sections 91-1-15 and 91-1-27 to -29 of the Mississippi Code of 1972, arguing that Claud's claim was barred.

¶21. The Chancellor, on June 22, 1992, entered an order dismissing Claud's claim as being time-barred under Section 91-1-15(d)(ii) of the Mississippi Code of 1972.

I. ISSUES

¶22. Claud raises three issues on appeal:

A. The three-year statute of limitations does not apply to Appellant, as that remedy applies only to those illegitimate children having an estate claim prior to July 1, 1981.

B. The original administratrix's failure to perform her duties should not be allowed to inure to her benefit.

C. The Mississippi Legislature's intent in amending the language of Section 91-1-15 was to correct and remedy the unconstitutionally disparate treatment given illegitimate and legitimate children, affording to illegitimate children the same rights and opportunities as legitimate children.

II. ANALYSIS

¶23. The record below establishes that Carrie H. Thompson held herself out as " . . . sister and only known living heir of Robert L. Johnson . . . " from at least November 20, 1974, the date of her written agreement with Stephen C. LaVere, until her death in 1983. This agreement further states that:

> Mrs. Thompson agrees that LaVere . . . is acting upon the representations to the effect that she is the nearest next of kin of Robert L. Johnson, the only other heirs being known being her son and grandson. She understands and agrees that in the event that there are other heirs of Robert L. Johnson who would have a right to the payment of such sums, she shall be responsible for the payment of the same in accordance with their

> interests in the monies that she has received and shall protect LaVere from any actions, costs or expenses as a result of claims made against such sums.

Mrs. Thompson further agreed that: " . . . this agreement shall bind the parties hereto, their heirs, personal representatives, and assigns . . . "

¶24. Annye C. Anderson assumed her responsibilities under the above agreement by obtaining the power of attorney from Mrs. Thompson on July 22, 1981, granting Ms. Anderson irrevocable power to act for Mrs. Thompson in all of her affairs. Ms. Anderson stated that her purpose for obtaining the power of attorney was because " . . . I was dealing with the Robert Johnson Estate with my sister."

¶25. In 1977, the United States Supreme Court rendered ***Trimble v. Gordon***, 430 U.S. 762 (1977). The ***Trimble*** Court struck down an Illinois statute which allowed children born out-of-wedlock to inherit by intestate succession only from their mothers, whereas children born in wedlock could inherit by intestate succession from both parents. The U.S. Supreme Court found such statutes to be violative of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

¶26. In response to ***Trimble v. Gordon,*** the Mississippi Legislature, in 1981, amended Section 91-1-15, Mississippi Code of 1972, to provide for intestate succession among an illegitimate and the natural father with certain limitations. The relevant language to this case in the act states as follows:

> A remedy is hereby created in favor of all illegitimates having any claim existing prior to July 1,1981, concerning the estate of an intestate whose death occurred prior to such date by or on behalf of an illegitimate or an alleged illegitimate child to inherit from or through its natural father and any claim by a natural father to inherit from or through an illegitimate child shall be brought within three (3) years from and after July 1, 1981, and such time period shall run notwithstanding the minority of a child.
>
> The remedy created herein is separate, complete and distinct, but cumulative with the remedies afforded illegitimates as provided by the Mississippi Uniform Law on Paternity; provided, however the failure of an illegitimate to seek or obtain relief under the Mississippi Uniform Law on Paternity shall not diminish or abate the remedy created herein.

¶27. The Appellee herein contends that the above statute granted Claud Johnson a window from July 1, 1981, through July 1, 1984, within which to assert his claim as the illegitimate son and only heir of Robert L. Johnson, deceased. Assuming for the purposes of this opinion that Ms. Anderson and the Chancellor below have correctly stated the legal effect of Section 91-1-15, we are asked by Claud to look through this window and review the acts of the administratrix and her testatrix which occurred prior to the opening of the estate of the decedent in Mississippi. Simply stated, Claud asks us to determine the effect on his rights of acts of commission and omission undertaken by Mrs. Thompson and Ms. Anderson, in their personal and representative capacities, from 1974 to the present.

¶28. We must first state the law applicable to the facts presented to us. Mississippi has long recognized the doctrine of *executorship de son tort*. ***See Hardy v. Thomas,*** 23 Miss. 544 (1852). This doctrine is generally defined as:

> . . . any intermeddling with the estate of a decedent under a claim of authority, or any act characteristic of the office of a rightful executor or which evinces legal control, makes the person doing such act an *executor de son tort*. Probably the most common form of intermeddling is taking possession of the assets without administration and controlling the property as if the taker were the legal representative.

31 Am.Jur.2d, ***Executor and Administration,*** § 36.

¶29. An *administratrix de son tort* is held to the same standard of trust and fiduciary responsibilities as a duly-appointed administratrix or executrix. Under Mississippi law, an administratrix is under a duty to use reasonable diligence to ascertain potential heirs. ***Smith by and through Young v. Estate of King,*** 501 So. 2d 1120 (Miss. 1987). An administratrix acts as a fiduciary for all persons interested in the estate. ***Shepherd v. Townsend,*** 249 Miss. 383, 392, 162 So. 2d 878, 881 (1964).

¶30. Further, in the absence of fraud or mistake, an administratrix or executrix may not take inconsistent positions which could be detrimental to beneficiaries, on the one hand, and beneficial to herself on the other hand. ***Estate of Ratliff,*** 395 So. 2d 956, 957 (Miss. 1981).

¶31. We find under the facts of this case that Carrie H. Thompson became an *executrix de son tort* of the unprobated estate of Robert L. Johnson in 1974, when she

entered into the agreement with LaVere. In their agreement she purported to be the "sister" of Robert L. Johnson and his only surviving heir. She further agreed that she, her personal representative, and assigns were bound to indemnify LaVere in the event that other heirs were later determined to be entitled to the proceeds of the Johnson estate.

¶32. Ms. Anderson assumed the status of an *executrix de son tort* by obtaining the irrevocable power of attorney from Mrs. Thompson and by accepting appointment as the personal representative of Mrs. Thompson's estate. Ms. Anderson admitted that in 1981, " . . . I was dealing with the Robert Johnson Estate with my sister."

¶33. The record establishes that Ms. Anderson was generally aware of the duties of an administratrix from 1981 to 1984. In fact, she was advised by counsel in 1982 that she should select " . . . a formal attorney in Mississippi or place of death for opening the estate for official probate purposes."

¶34. The record is clear that both Mrs. Thompson and Ms. Anderson held themselves out as representatives of the estate of Robert L. Johnson, particularly during the critical window from 1981 to 1984. Both *executrices de son tort* took actions with LaVere and other third parties which likely chilled any interest that LaVere or others would have had in coming to Mississippi and locating the rightful heirs. Finally, Ms. Anderson was advised in 1982 by her attorney to take action. This she failed to do.

¶35. Having concluded that Ms. Anderson was the *executrix de son tort* of the estate of Robert L. Johnson as a result of her "intermeddling" in his estate, should she

now be allowed to take under the will of Carrie H. Thompson to the exclusion of illegitimate heirs of the decedent?

¶36. In this case, Ms. Anderson, the former administratrix, took a position in the estate of Robert L. Johnson which was beneficial to herself and detrimental to Claud. Her failure to act to properly open the estate in 1982, while she was acting as *administratrix de son tort*, operates as a waiver of the statutory bar against Claud. Our Mississippi courts have long followed the maxim of equity that no person bound to act for another can act for herself. From 1974, until the Chancellor removed Ms. Anderson as administratrix in 1991, Mrs. Thompson and Ms. Anderson were under a duty to act for the rightful heirs of Robert L. Johnson, not for themselves. Thus, under these facts, equity will waive the statutory bar of Section 91-1-15 and open the window to the extent that Claud shall be allowed to prosecute his claim to be the illegitimate son of Robert L. Johnson, deceased, to the same extent as though he had filed his claim between July 1, 1981, and July 1, 1984.

¶37. We do not address the constitutional issues raised by the Appellant since such a determination is not necessary under the facts of this case.

III. CONCLUSION

¶38. The order entered by the Chancellor below barring the claim of Claud L. Johnson and striking his affirmative allegations is hereby reversed and this matter is hereby

remanded to the Chancery Court of Leflore County, Mississippi, for further proceedings consistent with this decision. ***Touart v. Johnston,*** 656 So. 2d 318, 321 (Miss. 1995); ***Mississippi Public Service Commission v. Mississippi Power & Light,*** 593 So. 2d 997 (Miss. 1991).

¶39. REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

LEE, C.J., PRATHER AND SULLIVAN, P.JJ., PITTMAN, BANKS, McRAE, ROBERTS AND SMITH, JJ., CONCUR.

BANKS, JUSTICE, DISSENTING FROM DENIAL OF MOTION FOR REHEARING:

¶40. On reconsideration, I am compelled to dissent from the denial of Mr. Harris's and Ms. Anderson's motion for rehearing in this matter because this Court has decided to apply a new doctrine on an appeal from a grant of summary judgment to dispose of a material issue of law adversely to the appellees.[1] Thus, the appellees are wholly deprived of an opportunity to confront this claim

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[1] I have also, on reconsideration, concluded that the use of the term "illegitimate" in the majority opinion to describe and refer to people born of unwed parents is outdated and derogatory, and unbecoming of this Court. Moreover, I believe the use of this term contradicts the spirit of ***Trimble v. Gordon,*** 430 U.S. 762 (1977), the case that first recognized that the rights of so-called "illegitimates" enjoy equal footing with those of their "legitimate" co-heirs. Indeed, it is ironic as well as unfortunate that an opinion which in fact *legitimizes* the claims of the alleged child of an unwed union between Robert Johnson and Virgie Jane Smith nevertheless refers to that child and others who are similarly born as "illegitimate."

with proof. This Court should not be the instrument of such a blatant denial of due process.

¶41. As the petitioners pointed out in their request for rehearing, the doctrine of *executorship de son tort* that has been utilized by this Court to reach its conclusion is subject to defenses that the petitioners could have asserted had Claud Johnson invoked this doctrine in support of his claim to heirship in the chancery court below. Indeed, that doctrine was never raised by any party: not in the chancery court below, not in the briefs on appeal, not even at oral argument. This Court has reversed the chancery court's grant of summary judgment on a clear statute of limitations issue, then, on a fact-intensive legal theory of fraud, and has rendered judgment in favor of the party opposing summary judgment. Petitioners have had no opportunity to make any record on their liability as *executrices de son tort,* nor any opportunity to assess the causal connection between any such liability and the statute of limitations here at issue in Claud's claim. They are entitled to a remand to develop the record on this question.

¶42. This Court has seen fit in other cases to address fraud when it leaps up out of the record but has not been raised by the parties. *See, e.g.,* ***In the Matter of Flowers,*** 493 So. 2d 950 (Miss. 1986) (reversing chancellor's decree where record indicated possible fraud on the court, and remanded for determination of the nature and effect of the possible fraud). However, it has also quite properly remanded the causes in those instances for further development of the record below. *E.g., Id.* at 951.

¶43. In my view, a remand is especially appropriate in this case because the Court was unable to conclude with certainty that the petitioners' "intermeddling" that gave rise to their status as *administratrices de son tort* occurred during the relevant time period, the three-year window given claimants such as Claud by statute: "Both *executrices de son tort* took actions with LaVere and other third parties which *likely* chilled any interest that LaVere or others would have had in coming to Mississippi and locating the rightful heirs" (emphasis added). *Ante* at ___. Petitioners' actions that occurred prior to 1977 were not in fact "intermeddling" in any of Claud's rights to Robert Johnson's estate, because Claud had no recognized rights to that estate prior to the United States Supreme Court's decision in ***Trimble v. Gordon,*** 430 U.S. 762 (1977) (striking down a statute that denied rights of intestate succession from fathers to children born out of wedlock). *See* ***In the Matter of the Estate of Smiley,*** 530 So. 2d 18 (Miss. 1988) (children born out of wedlock had no right to share in father's estate before July 1, 1981, with the passage of Miss. Code Ann. § 91-1-15).

¶44. Thus, the intermeddling such as would cause an impairment to Claud's capacity to assert his own rights logically could not have occurred until after 1977, when Claud's potential right to his putative father's estate was first suggested as a matter of federal constitutional law. Although the record does suggest some actions on the part of Carrie Thompson which might be considered "intermeddling" within the meaning of this doctrine, the record is plainly not fully developed on the question of when the intermeddling, if any, occurred. Thus, the petitioners should in all fairness and due process be given an

opportunity to address the allegation that they behaved in a manner which should excuse Claud for his failure to act within the statutory period, and offer any defenses that they may have. Of course, Claud would also have an opportunity on remand to more fully develop any claim of *executorship de son tort.*

¶45. That said, I have some reservations about the Court's use of this doctrine to toll the statute of limitations that would have otherwise barred Claud's claim. *Executorship de son tort* is universally deployed (outside of this State, as of today) "only for the purpose of suing an intermeddler or making him liable for the assets with which he has intermeddled." ***31 Am. Jur. 2d Executors and Administrators § 34 (1989).*** Indeed, although an *executor de son tort* has by law become something akin to a constructive trustee, he remains entitled to payment from the rightful administrator of an estate in reimbursement for his proper expenditures that were undertaken for the benefit of the estate. ***Id.*** at § 47. The principles that guide such executors' liability do not, to say the least, bespeak any punitive recriminations that typically characterize the types of fraud that are often used to equitably excuse the operation of independent statutes of limitations. Indeed, I have seen no authority in any jurisdiction for the proposition that *executorship de son tort* necessarily implies such malign intent on the part of the tortious executor as will toll a statute of limitations that might independently operate to bar another claimant against an estate.

¶46. Nevertheless, I do find marginally defensible, particularly in light of our related precedent, that aspect of the Court's decision that may be read to hold that a

showing that the petitioners acted as *executrices de son tort* (or "executrices in their own wrong" as defined in Miss. Code Ann. § 91-7-249) during Claud's three-year window could have sufficiently caused his failure to assert his claims against his father's estate so as to toll the statute of limitations. While I am inclined to affirm the chancery court on the basis of this record, this Court has tolled statutes of limitations, even the limitation in § 91-1-15, where it has found that a fraud has been perpetrated upon the Court, such as where the administrator knew of an heir and failed to notice him or notice the court that the estate had been opened. *See, e.g.*, ***Smith v. King***, 501 So. 2d 1120, 1122-23 (Miss. 1987) (holding that proof that an administratrix committed fraud upon the court when she knew of an illegitimate child of the decedent but failed to inform the chancery court of the child's existence would serve to toll the time bar of § 91-1-15(3)(c), where petition for heirship was otherwise untimely filed); *see also* ***In the Matter of Flowers***, 493 So. 2d 950 (Miss. 1986) (remanding for consideration of whether fraud was perpetrated on the court, which would toll the time bar of § 91-1-15(3)(c) of an otherwise untimely claim).

¶47. The Mississippi Legislature has also seen fit to toll a statute of limitations when the cause of action has been fraudulently concealed from a claimant by the defendants in the action. Miss. Code Ann. § 15-1-67. These same principles, that claimants' ability to assert their claims cannot be abrogated by others' adverse actions, imply that a finding of *executorship de son tort* will operate in a similar tolling manner where there is some showing that the act of intermeddling caused the claimant's failure to comply with the statute of limitations. This conclusion is

especially appropriate with regard to the statute of limitations in § 91-1-15, a statute which we have commanded to be interpreted broadly. ***Larsen v. Kimble,*** 447 So. 2d 1278, 1279 n.1 (Miss. 1984).

¶48. That said, I reiterate my view that the motion for rehearing should be granted, and the Court should remand this action, which came before us from a grant of summary judgment, for a development of the record on the causal relationship between the petitioners' intermeddling and Claud's failure to assert any claim that he may have had to his father's estate during the statutorily prescribed three-year window.

PRATHER AND SULLIVAN, P.JJ., AND PITTMAN, J., JOIN THIS OPINION.

APPENDIX B

IN THE CHANCERY COURT OF
LEFLORE COUNTY, MISSISSIPPI

IN THE MATTER OF THE ESTATE OF
ROBERT L. JOHNSON, DECEASED CAUSE NO. E-830

ORDER

MINUTE BOOK 141 PAGE 573

This day having come on for hearing the Motion of Robert M. Harris and Annye C. Anderson to Strike the Affirmative Defenses and Dismiss the Claim of Claud L. Johnson pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure. Counsel for both parties, on June 15, 1992, submitted to this Court and one another Memoranda of Law in support of their respective positions.

This Court has duly considered the pleadings, memoranda and oral argument of the parties.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The claim of Claud L. Johnson is barred as a consequence of the expiration of the three year period of limitations for claims to the assets of the estates of intestate decedents provided by Mississippi Code Section 91-1-15(d)(ii);

2. The Motion of Robert M. Harris and Annye C. Anderson to Strike the Affirmative Allegations and Dismiss the Claim of Claud L. Johnson is accordingly GRANTED, and

2. [sic] This Court expressly directs the entry of judgment dismissing said Affirmative Allegations and Claim.

ORDERED, ADJUDGED AND DECREED this twenty second day of June, 1992.

/s/ Jon M. Barnwell
CHANCELLOR

Approved as to form:

/s/ Jim Kitchens
Jim Kitchens
Attorney for
Claud L. Johnson

/s/ Stephen E. Nevas
Stephen E. Nevas
Attorney for
Robert M. Harris
and Annye C. Anderson

RECEIVED
JUL 22 1992

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Supreme Court, U.S.
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No. 97-855

In The

Supreme Court of the United States

October Term, 1997

In The Matter of the Estate of
ROBERT L. JOHNSON, Deceased

ROBERT M. HARRIS and ANNYE C. ANDERSON,

Petitioners,

vs.

CLAUD L. JOHNSON,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

RESPONDENT'S BRIEF IN OPPOSITION

JAMES W. KITCHENS*
NANCY A. OLSON
KITCHENS & ELLIS
610 North Street
Jackson, Mississippi 39202
601 355-7444

Counsel for Respondent

**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Petitioners are the legatees of a person whom they say was the last surviving half-sibling of Robert L. Johnson, Deceased. Respondent, who was born out of wedlock, is the biological son of the decedent. Petitioners' statement that Respondent claimed his parentage for the first time at age sixty-one is incorrect.

1. Whether the unanimous decision of the Mississippi Supreme Court, which reversed the trial court's grant of Petitioners' Motion to Dismiss, denied Petitioners' right to due process of law under the Fourteenth Amendment, when the Court, following its previous decisions, found that principles of equity would waive the applicable statute of limitations?

2. Whether the unanimous decision of the Mississippi Supreme Court to use principles of equity to waive the applicable statute of limitations is in conflict with this Court's recognition of a state interest in the just and orderly disposition of decedents' estates, where, as here, there has been no distribution of estate assets, no adjudication of heirship and no disposition of the decedent's estate?

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OPINIONS BELOW

The Opinion of the Supreme Court of Mississippi was electronically published on August 21, 1997. 1996 WL 91128. When counsel for Respondent contacted the Mississippi Supreme Court Clerk's office they were told that the decision is intended for publication but the official citation to the Southern Reporter is not yet available.

JURISDICTION

Petitioners did not timely and properly raise a federal question and this Court does not have jurisdiction to review the judgment of the Supreme Court of Mississippi on a writ of certiorari.

STATUTES AND RULES INVOLVED

§ 91-1-15. Descent among illegitimates; definitions.*

The Preamble to Chapter 339, Laws, 1983
(Paragraph 4)

WHEREAS, it now appears that there is confusion as to the legislative intent in amending Section 91-1-15, Mississippi Code of 1972, and said section is now interpreted by some segments of the judiciary to mean that the Legislature did not intend to create a new, separate and distinct remedy for the benefit of all illegitimates without

*Petitioners have lodged the full text of § 91-1-15 with the Clerk and reproduced a portion of said statute, including a portion of the Preamble, in their Petition for Writ of Certiorari.

any classification and said amendment as now codified in Section 91-1-15, Mississippi Code of 1972, is interpreted by some segments of the judiciary to be prospective only rather than retrospective and prospective in effect and is interpreted not to have created a new, separate and distinct remedy for the claims of all illegitimates without classification;

§ 91-1-29. Heirs to be cited to appear.**

All the heirs at law and next of kin of said deceased who are not made parties complainant to the suit or petition, shall be cited to appear and answer the same. And in addition thereto a summons by publication shall be made addressed to "the heirs at law of _____, deceased," and shall be published as other publications to absent or unknown defendants, and the cause shall be proceeded with as other causes in chancery, and upon satisfactory evidence as to death of said person and as to the fact that the parties to said suit are his sole heirs at law, the court shall enter a decree that the persons so described be recognized as the heirs at law of such a decedent, and as such be placed in possession of his estate. And said decree shall be evidence in all the courts of law and equity in this state that the persons therein named are the sole heirs at law of the person therein described as their ancestor.

Miss. Code Ann. (1972).

**§ 91-1-29, as reproduced above, is the wording of the statute on the date of the opening of the estate.

Rules of the Supreme Court of the United States

Rule 14. Content of a Petition for a Writ of Certiorari

1. (g)(i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

STATEMENT OF THE CASE

Petitioners are the legatees of Carrie Thompson, whom they claim was the half-sister of Robert L. Johnson, Deceased. Respondent Claud L. Johnson is the biological son of Robert L. Johnson, Deceased. Contrary to Petitioners' statements that they have shown Mrs. Thompson to be the decedent's half-sister and last surviving sibling, no such finding has been made by any court. Mrs. Thompson's relationship to the decedent, and Petitioners'

claimed right to inherit from this estate, have been contested and to date there has been no determination of heirship and no distribution of estate assets.

Respondent Claud L. Johnson was born out of wedlock to Virgie Jane Smith and Robert L. Johnson, Deceased, on December 16, 1931, in Lincoln County, Mississippi. (R. 218, Vol. I). During the latter years of his life Robert L. Johnson developed a notable reputation as a blues singer and guitarist, performing in Mississippi, Arkansas and Tennessee. Recognized today as one of the most influential bluesmen of all times, Robert L. Johnson died August 16, 1938, in Leflore County, Mississippi, at the age of 27. (R. 96, Vol. I). Respondent, his illegitimate son, was not yet seven years old when his father died. Although Robert L. Johnson left a legacy of forty-one recordings, consisting of twenty-nine of his own compositions and alternate versions of nearly half of those twenty-nine, he died a virtual pauper.

During the years following his untimely death, Robert L. Johnson's reputation increased. On **November 20, 1974**, Carrie Thompson, holding herself out as the decedent's half-sister, his last surviving sibling and his only heir, signed an agreement with Stephen LaVere, a music historian engaged in researching the life of Robert L. Johnson. Under this agreement Mrs. Thompson sold Mr. LaVere all of her purported right, title and interest in and to the musical works and recordings of Robert L. Johnson, as well as other documents, photographs, memorabilia and other material. The agreement provides for the heirs of Robert L. Johnson to receive one-half of all funds collected.

Until that time it was generally believed that the works of Robert L. Johnson were in the public domain and, as such, neither his heirs nor his estate were entitled to collect or were collecting royalties from the sale of his recordings. It was through Mr. LaVere's efforts that copyrights were obtained to the works of Robert L. Johnson and the estate was able to prosper. After entering into the agreement with Carrie Thompson, Mr. LaVere began to pursue, and was able to obtain, copyrights to the works of Robert L. Johnson.

On **June 1, 1989**, some fifty-one years after Robert L. Johnson's death, the initial petition to open his estate and the decree appointing Ms. Annye C. Anderson administratrix were filed in the Chancery Court of Leflore County, Mississippi, by Ms. Anderson. (R. 6-10, Vol. I). The Administratrix's Bond and Oath, filed by or on behalf of Ms. Anderson, was dated August 31, 1989. By placing her signature on that document, Ms. Anderson promised that she would "faithfully, truly and promptly perform and discharge all duties required of [her] by law" (R. 13, Vol. 1.). Among those duties is the requirement to summon the unknown heirs. Miss. Code Ann., § 91-1-29. When she testified in the Chancery Court of Leflore County on May 22, 1991, Ms. Anderson admitted that she made no effort to locate potential heirs of Robert L. Johnson (R. 79, Vol. III), while indicating her awareness that other potential heirs may exist. (R. 27, Vol. III). The required Notice to Creditors was not issued until **May 6, 1991**. The required Summons to Unknown Heirs was not published until **March 23, 1992**, by the successor administrator.

Annye C. Anderson, while not a blood relative of Robert L. Johnson, claims in the estate as a legatee under

the Last Will and Testament of Mrs. Thompson. The only known surviving potential blood-relatives of Robert L. Johnson are: (1) his son, Claud L. Johnson, Respondent herein; (2) Melvin Harris, grandson of Carrie H. Thompson and one of the petitioners herein; and (3) George Ball, Robert L. Johnson's cousin, who is a party to the Chancery Court heirship proceedings but is not a party to the proceedings in this court.

The First Inventory and Accounting made by Ms. Anderson was filed with the chancery court March 16, 1990. (R. 18-19, Vol. I). That inventory reported that the estate contained no property or money at that time and that the only assets were "miscellaneous and unknown." On May 3, 1991, the Second Inventory and Accounting was filed by Ms. Anderson, again reporting that the estate contained no property or money. (R. 60-61, Vol. I). However, Ms. Anderson still did not publish the statutorily-required notice to creditors and she did not summon the unknown heirs.

Finally, on May 6, 1991, almost two years after the opening of the estate, the first notice to creditors of the estate of Robert L. Johnson was published. (R. 114, Vol. I). Because the Chancellor (Judge) believed that a disinterested party should be in charge of the estate, on May 28, 1991, he appointed Willis B. Brumfield, then Chancery Clerk of Leflore County, successor administrator for the estate. (R. 112, Vol. I). (T. 990-92, Vol. III).

Subsequent to Mr. Brumfield's becoming successor administrator, the estate received the first payment of royalties on May 31, 1991. (R. 120-121, Vol. I). The First Accounting of Royalty Receipts and Expenses by Stephen

C. LaVere, and the Judgment approving the accounting, states that from November 21, 1974, the date of his agreement with Carrie Thompson, through February 20, 1983, the date of Carrie Thompson's death, "the total amount of $350.00 was paid directly to Carrie Thompson by Stephen C. LaVere in accordance with the terms of their agreement." (R. 122-123 and 135-136, Vol. 1.) Since the first payment of royalties, the estate has continued to receive royalty payments.

Respondent first appeared before the Chancery Court of Leflore County in response to a Petition to Determine Heirship, filed by the second administrator of the estate on February 6, 1992, and naming Claud L. Johnson as a potential heir and party defendant. (R. 175-178, Vol. I). Claud L. Johnson, by and through counsel, filed his formal entry of appearance February 19, 1992, (R. 204-205, Vol. I), and his answer to the Petition to Determine Heirship on March 10, 1992. (R. 213-219, Vol. I). On March 23, 1992, the statutorily required Summons to the Unknown Heirs at Law of Robert L. Johnson was first published, after the estate had been opened almost three years and after Claud L. Johnson had formally asserted his claim. (R. 259-262, Vol. II).

Ms. Anderson, one of the petitioners herein and the original administratrix, who failed to have the statutorily required notice to creditors issued for almost two years after she opened the estate and failed to have the statutorily required summons to unknown heirs published, and who stands to gain financially through her failure, filed a Motion to Dismiss (erroneously labeled a Motion for Summary Judgment by Petitioners in their brief) Claud L. Johnson's claim as time barred on April 30, 1992,

citing the three-year limitation period contained in § 91-1-15 of the Mississippi Code. (R. 269-272, Vol. II). At the conclusion of a June 22, 1992, hearing in the Chancery Court of Leflore County, Claud L. Johnson's claim was dismissed as time barred. Following the adverse ruling, Claud L. Johnson timely appealed to the Mississippi Supreme Court. (R. 463-464, Vol. II). Although the trial court denied Mr. Johnson's Motion to Stay the scheduled heirship proceeding, and it has proceeded, in part; to date there has been no determination of heirship and no distribution of estate assets.

Contrary to Petitioners' statement, this matter did not come "to the Mississippi Supreme Court on appeal from an Order for Summary Judgment by the Chancery Court." Petition for Writ of Certiorari, Page 11. While not germane to the matters before this Court, to avoid any misdirection Respondent must correct Petitioners' numerous misstatements regarding the matters before the Chancery Court, which brought the parties before the Supreme Court of Mississippi. Petitioners filed a Motion to Dismiss and Strike the Affirmative Allegations, not a Motion for Summary Judgment. A hearing was held on the Motion and an Order was entered, dismissing Respondent's claim as time barred. Petitioners have repeatedly attempted to convert this matter to a summary judgment proceeding, simply by changing its name, and that attempt must fail. Where resolution of the issue can be made without reference to matters outside the pleadings, for example, where an action can be dismissed because the applicable statute of limitations has expired, as was considered here, it is properly before the court and decided as a Motion to Dismiss. *Rankin County Bank v.*

McKinion, 531 So.2d 822 (Miss. 1988). The Chancellor did not convert the Motion to one for Summary Judgment and Petitioners cannot do so by simply changing words.

On March 28, 1996, the Supreme Court of Mississippi entered its unanimous decision, reversed the Chancery Court Order barring Respondent's claim and remanded the matter to the Chancery Court for further proceedings, holding that:

> . . . under these facts, equity will waive the statutory bar of Section 91-1-15 and open the window to the extent that [Respondent herein] shall be allowed to prosecute his claim to be the illegitimate son of Robert L. Johnson, deceased, to the same extent as though he had filed his claim between July 1, 1981, and July 1, 1984.

Mississippi Supreme Court Opinion, ¶ 36. In reaching its decision the Court applied several maxims of equity, including but not limited to, the doctrine of *executorship de son tort*.

Petitioners filed their Motion for Rehearing on April 12, 1996. That Motion was denied and the decision was electronically published on August 21, 1997. 1996 WL 91128. The decision is intended for publication but the official citation to the Southern Reporter is not yet available.

ARGUMENT

I. Because Petitioners did not timely and properly raise a federal question this Court lacks jurisdiction to review the decision on a writ of certiorari.

Rule 14(1)(g)(i) requires that the Petition for Writ of Certiorari contain:

> . . . specific references to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Petitioners have not met this requirement. Citing no authority and including no references to the record, Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257 and simply state that " . . . the decision- . . . deprived the Petitioners of their right to procedural due process under the Fourteenth Amendment." Petition for Writ of Certiorari, Pages 1 and 10.

More importantly, neither in their Brief before the Supreme Court of the State of Mississippi, filed July 12, 1993, nor in their Petition for Rehearing, was a federal question timely and properly raised by Petitioners.

Petitioners' Brief in response to Respondent's appeal to the Mississippi Supreme Court does not contain any allegation of a denial of any of Petitioners' constitutional rights. The Petition for Rehearing alleged three reasons to grant rehearing and asked the Mississippi Supreme Court to rehear the appeal because:

> First, the Court has overlooked and has misperceived essential facts that underpin its decision; Second, the Court has applied a doctrine in

> reaching its decision which is not supported by the facts or law of record, and Third, the Court has turned its back on its own decisions and the laws of this State as they limit the tolling of periods of limitation.

Petition for Rehearing by Robert M. Harris & Annye C. Anderson; In the Supreme Court of the State of Mississippi, Cause No. 92-CA-0883, dated April 11, 1996.

As this Court reiterated in its most recent opinion dealing with this issue:

> With 'very rare exceptions,' *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. *See, Heath v. Alabama*, 474 U.S. 82, 87, 106 S.Ct. 433, 436-437, 88 L.Ed.2d 387 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-219, 103 S.Ct. 2317, 2321-2322, 76 L.Ed.2d 527 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed. 849 (1940).

Adams v. Robertson, ___ U.S. ___, 117 S.Ct. 1028, 1029 (1997).

Similar to the posture of the present Petition for Writ of Certiorari, the *Adams* Petitioners raised their alleged due process claim in their petition for rehearing. As this Court noted:

> [W]e have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the

> question, *see Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549-550, 107 S.Ct. 1940, 1947-1948, 95 L.Ed.2d 474 (1987); *Hanson v. Denckla*, 357 U.S. 235, 244, n.4, 78 S.Ct. 1228, 1234, n.4, 2 L.Ed.2d 1283 (1958); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128, 65 S.Ct. 1475, 1480, 89 L.Ed. 569 (1945).

Adams, at 1031.

Buried within the Petition for Rehearing, and citing no authority, Petitioners make the general statement that application of the doctrine of *executor de son tort* denies them of their right to due process of law. Notably, not one of Petitioners' arguments is the denial of due process or is premised on the denial of due process and the Mississippi Supreme Court opinion is silent on the purported federal question which Petitioners allege is now before the Court. "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented[.]" *Adams*, at 1029, *citations omitted.*

II. Petitioners were not denied their right to due process of law under the Fourteenth Amendment when the Supreme Court of Mississippi followed its previous decisions and held that principles of equity would waive the applicable statute of limitations.

Even if this petition is properly before the Court, the decision of the Supreme Court of Mississippi did not deny Petitioners their right to due process of law and was not, as Petitioners argue, based solely on the equitable doctrine of which they now complain. In support of their argument Petitioners rely on and quote from Justice Banks's dissent, which is a dissent to the denial of the Petition for Rehearing, not a dissent from the opinion or the result.

The parties are before this Court on a Petition for Writ of Certiorari, which asks this Court to review the judgment of the Supreme Court of Mississippi, a unanimous decision. Moreover, the record clearly supports the Mississippi Supreme Court's reliance on equitable principles, including the doctrine of *executorship de son tort*, to waive the applicable statute of limitations, and their reliance is not premature.

The doctrine of *executorship de son tort* means "any intermeddling with the estate of a decedent under a claim of authority[.]" 31 Am.Jur.2d ***Executor and Administrators***, § 36. The effect of this doctrine, and all other maxims of equity, is to prohibit a wrongdoer from benefitting from his own wrong. Warner's Griffith, *Mississippi Chancery Practice* (Rev. Ed.) §§ 32-47.

> No person bound to act for another can act for himself. This is a principle as old as the first among laws, and it has an especially wide application in the processes and proceedings in chancery as a court of conscience.

Griffith, *Mississippi Chancery Practice*, § 47.

From at least November 21, 1974, the date of the written agreement between Stephen C. LaVere and Carrie Thompson, who claimed to be the half-sister of Robert L. Johnson, deceased, Mrs. Thompson held herself out as the only living heir of the decedent. With the signing of this agreement Mrs. Thompson began to act as an *executrix de son tort* of the unprobated estate of Robert L. Johnson, deceased, which, at that time had no value.

The Mississippi Supreme Court found that Petitioner Annye Anderson "assumed the status of an *executrix de*

son tort" when she obtained the power of attorney from Mrs. Thompson and began acting for her in 1981. Mississippi Supreme Court Opinion, ¶ 32. In fact, at the May 22, 1991, hearing, Ms. Anderson testified that she had contacted various companies regarding estate assets in the early 1980s, prior to the opening of the estate and her appointment as administratrix. (R. 34, Vol. 3.) In discussing the 1981 power of attorney she received from her half-sister, Carrie Thompson, Ms. Anderson stated that she received it because she "was dealing with the Robert Johnson estate with my sister . . . [and] had been dealing with the estate . . . for quite some time." (R. 45-46, Vol. 3.)

Petitioners allege that the Mississippi Supreme Court improperly relied on the above testimony. However, on Page 9 of their brief to the Mississippi Supreme Court Petitioners acknowledge the actions of Mrs. Thompson and Ms. Anderson, described in the above-quoted testimony, and state as follows:

> Most striking about the circumstances of this case is that the heirs of Robert L. Johnson have, since the late 1970s, been working to regain control and obtain compensation from the works and estate of Robert Johnson.

In the Supreme Court of the State of Mississippi, Cause No. 92-CA-0883; Brief of Appellees Robert M. Harris & Annye C. Anderson, July 12, 1993.

Contrary to Petitioners' contention, the Mississippi Supreme Court did not presume malign intent on the part of Ms. Anderson. Rather, the Court simply recognized and gave a name to the actions taken by Mrs. Thompson and Ms. Anderson between 1974 and 1989. Clearly, Mrs.

Thompson, and subsequently, Ms. Anderson, performed the functions of administratrix, without authority from any court, until 1989, when Ms. Anderson opened the estate and took the Administrator's oath. Unfortunately, upon receiving the authority to act as administratrix Ms. Anderson did not act in conformity with the duties of that office.

Most importantly, in her position as administratrix Ms. Anderson held a fiduciary relationship to the decedent's creditors and heirs and as such she had, at the very least, an affirmative duty to summon the unknown heirs of the estate, which she did not do. *Miss. Code Ann.* § 91-1-29. With this fiduciary relationship comes the presumption that acts of the administratrix are for the benefit of, not contrary to, the interests of other heirs. Warner's Griffith, *Mississippi Chancery Practice* (Rev. Ed.), § 47.

Petitioners were not denied their due process rights when the Mississippi Supreme Court followed its previous decisions and held that Mrs. Thompson and Ms. Anderson were under a duty to act for the estate, not themselves, and allowed principles of equity to waive the statutory bar. The Supreme Court of Mississippi has repeatedly held that mandatory compliance with the provisions of § 91-1-15(3)(c) by an illegitimate presupposes the good faith compliance by the administratrix/administrator with the obligation imposed by law to summon the heirs. See, *LeFlore by Primer v. Coleman,* 521 So.2d 863 (Miss. 1988); *Smith by and Through Young v. Estate of King,* 501 So.2d 1120 (Miss. 1987); *Matter of Estate of Flowers,* 493 So.2d 950 (Miss. 1986).

As the Supreme Court of Mississippi stated:

> Our Mississippi courts have long followed the maxim of equity that no person bound to act for another can act for herself. From 1974, until the Chancellor removed Ms. Anderson as administratrix in 1991, Mrs. Thompson and Ms. Anderson were under a duty to act for the rightful heirs of Robert L. Johnson, not for themselves.

Opinion of the Supreme Court of Mississippi, ¶ 36.

III. The unanimous decision of the Mississippi Supreme Court, holding that principles of equity would waive the applicable statute of limitations, is not in conflict with the recognized state interest in the just and orderly disposition of decedent's estates.

At issue in the court below was the right of an illegitimate child to inherit from his intestate biological father. Articulating that this is a matter particularly within the competence of the individual States, this Court recognized the State's primary responsibility in this area and stated that "[a]bsent an infringement of a constitutional right, the federal courts have no role [in the distribution of estates][.]" *Trimble v. Gordon*, 430 U.S. 762, 771 (1977).

Following the *Trimble* decision Mississippi's law concerning the right of an illegitimate child to inherit from its father underwent drastic change. During its 1981 Regular Session the Mississippi Legislature passed an act amending § 91-1-15 of the Mississippi Code of 1972.

This amendment, intended to remove the insurmountable barrier to inheritance by illegitimate children when compared to the rights enjoyed by legitimate children, and to provide for intestate succession between an illegitimate child and its father, contained an additional remedy in favor of all illegitimate children *having a claim existing prior to the adoption of the amendment on July 1, 1981 and concerning the estate of an intestate whose death occurred prior to such date.* Recognizing the possibility of opening the door to stale or fraudulent claims and creating uncertainty as to the status of title to real property, the legislature provided a three-year window of opportunity for those who previously had been denied their right of inheritance.

Petitioners do not accurately describe the legislative intent behind the adoption of the Preamble to § 91-1-15. Contrary to Petitioners' statement, it is clear from a reading of the entire Preamble adopted by the Mississippi Legislature and added to § 91-1-15, that the Preamble was intended to clarify the legislative intent, not to explain the legislature's awareness of the possible litigation of stale claims.

When Robert L. Johnson died in 1938 his estate had no tangible assets or value. More than fifty years after the musician/composer's death, and five years after the three-year window of opportunity found in § 91-1-15 had closed, a fortunate change of circumstances, of which Respondent had no knowledge and could have had no knowledge, occurred, which allowed the estate to have monetary value and Robert L. Johnson's estate was opened.

Under these unique facts Respondent lacked both knowledge and notice of the existence of an estate against which he could assert a claim. *Matter of Heirship of McLeod v. Price*, 506 So.2d 289 (Miss. 1987). Respondent never had a reasonable opportunity to assert his claim and could not effectively utilize the opportunity the Mississippi legislature intended to provide for him. *Mills v. Habluetzel*, 459 U.S. 91 (1982).

The first publication summoning unknown heirs, required by § 91-1-29, occurred March 23, 1992, in six newspapers within a three-state area (Mississippi, Arkansas, and Tennessee). Following a strict construction of the language of § 91-1-15, anyone who answered the summons would be allowed to participate in the heirship proceeding, *except illegitimate children*, an unconscionable result and one which has occurred in this case. On June 5, 1992, George Ball, one of the decedent's cousins, filed a Motion for Leave to File Claim Out of Time. That motion was granted on June 29, 1992, and Mr. Ball has been allowed to participate in the heirship proceedings.

If Claud L. Johnson were the legitimate son of Robert L. Johnson he would have been allowed to participate in the heirship proceeding without any complaint of a stale claim. If all the facts and circumstances were the same but we were dealing with the estate of Claud L. Johnson's mother, he would have been allowed to participate in the heirship proceeding without any complaint of a stale claim. It is only because his parents were not married to each other on the date of his birth that Petitioners can put forth the argument that Respondent is time-barred from participating in the heirship proceeding.

The legitimate state interest in the just and orderly disposition of estates, which includes assuring the certainty of titles, the prompt determination of the rights of descent and distribution, and the speedy and proper closing of estates, will not be defeated by Respondent's participation in the heirship proceeding. This Court has recognized the substantial state interest in providing for the just and orderly disposition of property at death. *Lalli v. Lalli*, 439 U.S. 259 (1978). In the case of Mr. Johnson's estate, there was no property at death and there was nothing of value. Now the estate has acquired considerable value. However, there has been no determination of heirship by any court and no distribution of estate assets has occurred. Under these circumstances, denying Respondent the opportunity to participate in the heirship proceeding is not justified by the state interest in the just and orderly disposition of estates.

Petitioners argument that elemental fairness is violated by expecting them to defend against a claim and gather reliable evidence of what took place in 1931 must fail. That argument ignores the basic fact that the burden of proof, which in this instance is **to prove paternity by clear and convincing evidence**, is on Respondent. § 91-1-15, Miss. Code Ann. (1972). Respondent is the one who must gather reliable evidence of what took place in 1931. Respondent is the one who must overcome the difficulties to which Petitioners make reference.

Moreover, all parties to the heirship proceeding, to one degree or another, are faced with the same difficulty: having to prove/disprove what took place many, many years ago. Respondent must prove his parentage and

what took place in 1931. Petitioners must prove the lineage of Mrs. Thompson by proving what took place in 1903, the year their legatee, Mrs. Thompson, was born. Difficulties of proof may be or have been encountered during the presentation of Petitioners' proof *and* Respondent's proof. It cannot be said that allowing Respondent to participate in the heirship proceeding offends the state interest in discouraging the litigation of stale claims but that allowing Petitioners to participate does not.

The estate has been opened for more than eight years. There has been no determination of heirship by the trial court and no estate assets have been distributed. Under these circumstances, it cannot be said that allowing Respondent to participate in the heirship proceeding offends the state interest in the just and orderly disposition of estates.

CONCLUSION

The petition exalts form over substance. The asserted errors consist of nothing more than alleged erroneous factual findings or the misapplication of a properly stated rule of law. The decision below was a plainly correct application of settled law, there is no split among the circuits, no federal question is involved and none was timely and properly raised. Petitioners' fact-bound claim does not warrant review by this Court and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

James W. Kitchens
Nancy A. Olson
Kitchens & Ellis
610 North Street
Jackson, Mississippi 39202
601 355-7444
Counsel for Respondent

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

In the Matter of the Estate of
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ROBERT M. HARRIS and ANNYE C. ANDERSON,

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Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

REPLY FOR PETITIONERS

Of Counsel:
WHITMAN MOUNGER
Whittington Building
Suite 2
Post Office Box 1123
Greenwood, Mississippi
39830-1123
(601) 453-7605

LEO NEVAS*
STEPHEN E. NEVAS
NEVAS, NEVAS & CAPASSE
246 Post Road East
Post Office Box 791
Westport, Connecticut
06881-0791
(203) 226-1211
Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONERS' REPLY BRIEF

The Respondent has not replied to the substance of Petitioners' argument that they have been denied the fundamentals of procedural due process by the Mississippi Supreme Court's waiver of a period of limitations without notice or the opportunity to offer evidence or defenses in any adversary proceeding. Nor has the Respondent answered Petitioners' argument that the Mississippi Court's decision conflicts with *Trimble v. Gordon,* 430 U.S. 259 and *Mills v. Habluetzel,* 456 U.S. 91 by ignoring the problems inherent in stale claims and allowing a man born out-of-wedlock to seek an inheritance from his asserted father's estate more than 60 years after he was born.

ARGUMENT

I. Petitioners properly raised a federal question at their first opportunity, thereby providing this Court with jurisdiction to review the decision below on a writ of certiorari pursuant to 28 U.S.C. sec. 1257.

The injury to the Petitioners' rights to due process under the Fourteenth Amendment did not take place at trial but on appeal. The injury occurred when the Mississippi Supreme Court, in its decision of March 28, 1996 *sua sponte* invoked and applied an evidence-dependent doctrine (*executorship de son tort*) to waive a period of limitations for claims by out-of-wedlock children without affording the Petitioners any notice or opportunity to gather evidence, offer defenses, brief or argue the rule which the Court applied or the facts which it assumed.

At their first opportunity to raise this claim Petitioners did so in a Petition for Rehearing on April 12, 1996.

> (Petitioners) believe that to deny them the right to assert defenses to the doctrine of *executor de son tort*, on which the Court bases its decision, would deny them the essentials of notice and an opportunity to be heard which form the basis of Due Process pursuant to the Fourteenth Amendment of the United States Constitution. (Petition for Rehearing, April 12, 1996, at 5).

In fact, Petitioners claim for denial of Due Process is repeated four times within their Petition for Rehearing at 8, 9, 16 and 5.

This claim is cited in the Petition for Certiorari, 8-9, ("Proceedings before the Mississippi Supreme Court") and the Appendix to their Petition for Certiorari also refers to this claim, all in conformity with this Court's Rule 14(1)(g)(i).

The response of the Mississippi Supreme Court to the Petition for Rehearing confirms that the Court had an appropriate opportunity to be aware of and respond to Petitioners' Due Process claims. Four members of the Mississippi Court who dissented from the decision to deny Rehearing explicitly acknowledged and adopted Petitioners' Due Process argument:

> " . . . (T)he Court has decided to apply a new doctrine on an appeal from a grant of summary judgment to dispose of a material issue of law adversely to the appellees. Thus, the appellees are wholly deprived of an opportunity to confront this claim with proof. The Court should

not be the instrument of such a blatant denial of due process."

"As the petitioners point out in the request for rehearing, the doctrine of *executorship de son tort* that has been utilized by the Court to reach its conclusions is subject to defenses that the petitioners could have asserted had Claud Johnson invoked this doctrine in support of his claim of heirship in the Chancery Court below. Indeed, that doctrine was never raised by any party: not in the Chancery Court below, not in briefs on appeal, not even at oral argument. This Court has reversed the chancery court's grant of summary judgment on a clear statute of limitations issue, then, on a fact-intensive legal theory of fraud, and has rendered judgment in favor of the party opposing summary judgment. Petitioners have had no opportunity to make any record on their liability as *executrices de son tort,* nor an opportunity to assess the causal connection between any such liability and the statute of limitations here at issue in Claud's claim. They are entitled to a remand to develop a record on this question." (Appendix, Petition for Certiorari, at 12-13).

The Petitioners have satisfied the requirement that a state court should first have an opportunity to consider federal claims. *Adams v. Robertson,* 520 U.S. ___, 137 L. Ed. 2d 203, 117 S. Ct. 1028 (1997).

II. Petitioners' Motion to Dismiss was converted to a Motion for Summary Judgment by the Mississippi Rules of Civil Procedure.

The initiating act in this chain of events, the Motion of Robert M. Harris and Annye C. Anderson to Strike the Affirmative Allegations and Dismiss the Claim of Claud Johnson (R. Vol. II, 269), was converted to a Motion for Summary Judgment by operation of Mississippi Rule of Civil Procedure (MRCP) 12(b) when Movants (here Petitioners) submitted matter outside the pleading.

This Rule provides that if "matters outside the pleading are presented to and not excluded by the court, the matter shall be treated as one for summary judgment." The Mississippi Rule is identical in all material respects to Federal Rule of Civil Procedure 12(b). On June 17, 1992 the Petitioners filed a document containing matters outside the pleading, a lengthy Affidavit by Annye C. Anderson. (R. Vol. III, 357). Respondent offered no document and cited no evidence in reply to the summary judgment proceeding. (On appeal to the Mississippi Supreme Court, Respondent submitted supposed evidence, none of which had been offered or tested in any adversary proceeding.) The Anderson Affidavit was admitted by the Chancery Court. (R. Vol. 4, 9) and the proceeding thereby became one for summary judgment. *Young v. Biggers,* 917 F.2d 873, 876 (C.A. 5th, 1990).

III. A State's interest in the just and orderly disposition of decedent's estates does not insulate it, as the Respondent suggests, from affording procedures to claimants that are consistent with the Fourteenth Amendment.

Nothing demonstrates the relevance of constitutional principles to this matter more than the decisions of this Court that rely on the Equal Protection Clause of the Fourteenth Amendment to require that states allow a child born out-of-wedlock to, in some circumstances, claim inheritance from the estate of the man they claim to be their father.

In *Trimble v. Gordon*, 430 U.S. 762 (1977) and *Mills v. Habluetzel*, 456 U.S. 91 (1982), this Court held that the state's administration of estates must yield to the Equal Protection clause of the Fourteenth Amendment to the degree that they must entertain such claims to inheritance by out-of-wedlock children, subject to their vigilance to the unique dangers inherent in these claims and appropriate measures to minimize them. The risk is that these claims can arise so long after the birth of the claimant that they cannot be fairly adjudicated.

> The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims. *Mills*, 456 U.S. 91, 99; see also *Lalli v. Lalli*, 439 U.S. 259, 269-272 (1978); *Trimble*, 771.

In this matter, the Mississippi Court has gone to an opposite extreme, one never anticipated by *Trimble, Lalli* or *Mills*. It has waived a period of limitations without

notice, evidence or a hearing to allow the claim of a man more than 60 years old when he first lodged his claim, 54 years after the Decedent's passing. The Petitioners apologize to the Court for miscalculating his age as 61.

Respondent cites no modern case in which this or any other court has held that an individual's right to due process under the Fourteenth Amendment or any other constitutional right must fall to the State's asserted interest in providing for the administration of decedent's estates. Yet, that is what he seeks here.

IV. Respondent's Brief in Opposition is grounded on numerous inaccurate assertions of fact that are not supported by the Record, as follows:

1. The Respondent claims that an "R.L. Johnson" is his biological father and that this person is the Decedent. There is no proof or finding of his claim.

2. There is no known basis in fact or in the record for the Respondent's assertion that he "lacked knowledge of an estate against which he could assert a claim. Further, the record provides no reason to believe that the Respondent was not previously aware of his asserted paternity or, that he was in any way prevented or discouraged from alleging that the Decedent is his biological father or, that he could not use the opportunity provided to him by Mississippi Code Ann. sec. 91-1-15 to assert his claim within the period of limitations specially established in response to *Trimble*, supra.

3. The Decedent made 41 recordings. Some had been offered for sale to the public prior to his death in 1938. There is nothing in the record to establish that the Decedent "died a virtual pauper".

4. It is incorrect to claim that Mrs. Anderson admitted she made no effort to locate potential heirs of the Decedent.

5. Respondent's statement that as Administratrix Mrs. Anderson reported that the Estate assets were "miscellaneous and unknown" and that the Estate, at the time of her report contained no property or money is misleading since it does not indicate why she was unable to locate Estate property at that time.

6. It is incorrect and there has been no finding that Mrs. Thompson "sold Mr. LaVere all of her purported right, title and interest in and to the musical works and recordings of Robert L. Johnson, as well as other documents, photographs, memorabilia and other material." To the extent that there was any agreement between Mrs. Thompson and Mr. LaVere, it was formally rescinded by Mrs. Thompson. (R. Exhibits F, G, from Hearing of 5/22/91).

7. Respondent's assertion that Mrs. Anderson did not act in conformity with the duties of her office is incorrect. The Chancery Court made a pointed statement, cited in the Petition for Certiorari at 17 and in the Record that it did not make such a finding and was changing administrators only because of a potential heirship contest. (R. Vol. 4, Hearing of May 22, 1992, 9, et seq.)

CONCLUSION

The decision of the Mississippi Supreme Court raises a serious federal question affecting the scope and true meaning of this Court's prior decisions in *Trimble v. Gordon* and *Mills v. Habluetzel*. If not reversed or remanded for an initial evidentiary hearing it will compel the Petitioners in this matter to defend a claim of paternity and inheritance substantially more than a half century after the birth of the claimant and the passing of the Decedent when it is recognized that memories are vague, witnesses have died and evidence is virtually non-existent. This decision is also capable of repetition. It is likely that other courts will, as a result, believe they are permitted to cast aside periods of limitation without an evidentiary hearing and authorize paternity and inheritance claims against estates and other heirs by aging persons purporting to be biological heirs of the decedent in circumstances where evidence, witnesses and recollections are equally scarce.

Respectfully submitted,

LEO NEVAS*
STEPHEN E. NEVAS
NEVAS, NEVAS & CAPASSE
246 Post Road East
Post Office Box 791
Westport, Connecticut 06881-0791
(203) 226-1211
Counsel for Petitioners

**Counsel of Record*